STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-419

October 31, 2000

MAINE PUBLIC UTILITIES COMMISSION
Rulemaking to Establish Underground
Facility Damage Prevention Requirements
(Chapter 895)

ORDER ADOPTING
RULE AND STATEMENT
OF POLICY BASIS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. INTRODUCTION

In this Order, we adopt a rule[1] that establishes the requirements for compliance with the underground facility damage prevention program operating in Maine.

The rule describes the responsibilities of excavators, underground facility operators (operators), the damage prevention system, and the Public Utilities Commission (Commission) in implementing Maine's damage prevention statute. The rule establishes notification, marking, and reporting procedures, defines violations and penalties, and describes the process by which the Commission will enforce the program and monitor its success.

The rule incorporates the provisions of the statute and provides further implementation details to guide excavators and operators in complying with the statute. By including both the provisions already present in law and the additional implementation requirements adopted by the Commission in the rule, we will provide all affected persons with a single, comprehensive statement of Maine's damage prevention program requirements.

II. BACKGROUND

A. Legislative Directive

Title 23 M.R.S.A. § 3360-A requires that a damage prevention system exist in Maine to ensure that adequate safety precautions protect the public when excavation occurs near an underground facility. The law is designed to protect the public from physical harm and interrupted service that can result from damage to underground facilities.

[1] We adopt the rule pursuant to our general rulemaking authority in 35-A M.R.S.A. § 111 and the authority conferred in 23 M.R.S.A. 3360 (the Dig Safe law). The Dig Safe law contains no legislative designation as either a major substantive rule or a routine technical rule.

The statute establishes procedures that must be followed by excavators and underground facility operators when excavation occurs. Dig Safe System, Inc. (Dig Safe), an independently owned corporation that operates the New England regional damage prevention system, currently administers the underground safety system mandated by law.

During the second session of the 119th legislative session, Maine's Legislature revised 23 M.R.S.A. § 3360-A.[2] Among other provisions, this legislation grants the authority to enforce the damage prevention program to the Commission. The revision authorizes the Commission to impose penalties for violations and to monitor the program to judge its success in preventing public injury. The Commission has not had such authority prior to the adoption of this law.

The statutory revisions that prompt this rulemaking take effect on August 11, 2000.

B. Procedural History

On June 6, 2000, the Commission issued a Notice of Rulemaking (NOR) with a draft proposed damage prevention rule. We distributed the NOR broadly to municipal, contractor, trade, and industry associations, and to all public utilities. The Commission also published notice of this rulemaking in newspapers of general circulation throughout the state.

A public hearing was held on July 5, 2000 at the Commission offices in Augusta. The following entities commented orally and in writing: Union Water Power Company, owner of On Target Locating Service (On Target); Telephone Association of Maine (TAM); Northern Utilities, Inc. (Northern); New England Dig Safe; Maine Dig Safe; Central Maine Power Company (CMP); Maine Water Utilities Association (MWUA); Maine Pulp and Paper Association (MPPA); International Paper (IP); Plum Creek Timber Company (Plum Creek); and the Maine Forest Products Council (MFPC).

The following entities submitted only written comment: Associated Constructors of Maine, Inc.; Bell Atlantic - Maine[3] (BA); Maine Department of Transportation (DOT); Bangor Water District; Maine Municipal Association (MMA); and Maine Natural Gas (MNG).

[2] An Act Relating to Underground Facility Plants, P.L. 1999, ch. 718.

[3] Now doing business as Verizon-Maine

III. DISCUSSION OF INDIVIDUAL SECTIONS

A. General Principles

1. Provisions contained in law and in current practice. The rule comprises three types of provisions: those required by statute, those currently practiced by the Dig Safe program, and those that are necessary for the Commission to enforce the law and monitor the program's effectiveness.

The majority of the provisions in the rule are practices that are required by Maine law, as set forth in 23 M.R.S.A. § 3360-A and P.L. 1999, ch. 718. Some aspects of the statute represent important departures from Maine's existing Dig Safe program.[4]

Other provisions in the rule reflect current practices of Dig Safe and its members. The Commission indicated in the NOR that since these procedures seem generally effective in protecting the public from harm and utilities' underground facilities from damage, it is not our intention to change them through this rule. Changes to current Dig Safe practices would require consideration of the region-wide impact.

Finally, the rule includes enforcement procedures that will allow the Commission to monitor the program's effectiveness and to enforce the law, as we are directed to do in the new statutory amendments. We intend to recommend changes to the law and to make changes to our rule to the extent our monitoring reveals that such changes are necessary. The Commission invited parties to the rulemaking to comment on the efficiency and effectiveness of the draft procedures.

2. Articulation of Statute. Where warranted, we have in the rule restated the requirements of the statute to simplify and clarify the meaning of the statute. In addition, we have organized the rule in a manner that will be useful to the persons using it by grouping all responsibilities of one entity together, generally in a chronological order. We invited parties to the rulemaking to consider whether the language in the draft rule accurately reflects the law and in the final rule, have reflected many of their comments.

3. Enforcement procedures. Title 23 M.R.S.A. § 3350-A(11) grants the Commission authority to adopt procedures to enforce the damage prevention program provisions. Therefore, the Commission must establish, through this rule, a procedure for determining violations and for assessing and collecting fines.

In the rule, we establish a procedure that is intended to accomplish three overarching goals. First, it will be flexible enough to allow the Commission to

[4] For example, sections 5-B and 5-C of Chapter 718 create an alternative method whereby commercial timber harvesters and borrow pit operators may more expeditiously excavate near underground facilities.

respond to a violation in a manner that is commensurate with a person's violation history. Second, it will be efficient enough to allow expeditious processing that is not overly onerous to affected persons. Finally, it will be effective in deterring incidents that result in harm to the public caused by damage to underground facilities. With this in mind, the rule includes reporting requirements that allow the Commission to recognize violations and to monitor results as well as a multi-step enforcement process that allows many violations to be resolved with a minimum of administrative process.

B. Section 1: General Provisions

Section 1(A) states that the purpose of this rule is to establish the responsibilities of persons subject to the State's underground facility damage prevention requirements contained in Title 23 M.R.S.A. § 3360-A and identifies the persons subject to the provisions of the rule. No commenters commented on this provision, and its substance remains unchanged from the draft rule.

C. Section 2: Definitions

Section 2 defines terms used in the rule. Definitions contained in the statute have been incorporated into the rule.

The rule does not directly define "borrow pit," but references the definition contained in the sections of Maine law that govern certain operations of borrow pit operators.[5] We decline to state that definition in our rule, because the agencies that deal regularly with these entities are better qualified to determine the best definition, both now and in the future. We note that, should the definition of "borrow pit" be changed in Title 38 of Maine law, the revised definition will be incorporated into our rule.

On Target expressed concern that excavators occasionally stretch the bounds of the definition of "emergency" when calling Dig Safe, causing unnecessary expense to utilities. The Commission intends to watch for areas of inefficiency in the operation of the rule and to recommend improvements. We will include On Target's concern in these efforts, to the extent we find it possible to do so. We invite persons to inform us of such instances using the reporting procedures established in Section 4(D)(2) and 6(C)(1) of the rule.

Bangor Water District commented that the installation of signs by the Department of Transportation should not be exempt from the definition of "excavation," as it may cause damage to facilities during installation or impede operator access. The rule is consistent with the statute in this regard, and we decline to revise the language in the final rule. However, we understand that damage occasionally occurs during sign installation, and we will monitor the extent to which this occurs to the extent we find it

[5] "Borrow pit" means a mining operation undertaken primarily to extract and remove sand, fill or gravel. "Borrow pit" does not include any mining operation undertaken primarily to extract or remove rock or clay. 38 M.R.S.A. § 482(1-A).

possible to do so. As indicated above, we invite persons to inform us of damage prevention problems, using the reporting procedures established in Section 4(D)(2) and 6(C)(1) of the rule. We will also act upon MWUA's recommendation that we coordinate our activity with DOT's utility accommodation policy to minimize damage caused by DOT exempt activity.

MWUA commented that the term "operator" appeared in two definitions and was consequently ambiguous in the rule. We agree and have removed the term from the definition of "underground facility operator." This change clarifies that any owner or operator of an underground facility is an "operator." Operators are categorized as "member operators" and "non-member operators," as described in the definitions. The responsibilities imposed by the law, and therefore the rule, differ for member operators and for non-member operators.

In evaluating the comments, we found that the term "violation" was easily misunderstood. Therefore, we have added a definition of "violation" that clarifies that the term includes both acts subject to the imposition of an administrative penalty and other acts of non-compliance with the provisions of the rule.

D. Section 3: Responsibilities of the Designer

Section 3 describes responsibilities of architects, engineers, or other persons requiring excavation. The provision is derived from the statute.

MWUA and CMP commented that the statute does not require that operators provide information in writing, and that such a requirement could result in extensive development of material by smaller operators who do not possess written descriptions of all facilities. MWUA and CMP suggested that the rule require submission of "recorded information" as is required by statute. We agree that the provision of the rule should mirror the provision in statute, and have revised the language in the final rule.

On Target commented that designers occasionally notify Dig Safe to obtain operator markings for design purposes when excavation is not imminent, causing unnecessary expense to utilities. On Target asserted that designers should contact operators directly to determine the location of facilities in a potential building site. As stated elsewhere in this Order, the Commission intends to watch for areas of inefficiency in the operation of the rule and to recommend improvements. If On Target's concerns cause unnecessary expense for operators or Dig Safe, persons should inform us by using the reporting procedures established in Section 4(D)(2) and 6(C)(1) of this rule

E. Section 4: Responsibilities of the Excavator

1. Section 4(A): Pre-marking

Section 4(A) establishes an excavator's pre-marking responsibility. The responsibility to pre-mark is derived from statute, and the requirement to use white paint is derived from Dig Safe procedures.

MPPA commented that white paint can be unsafe under some circumstances, notably in snow, because the color will be unnoticeable. MPPA recommended that the rule reflect the language of the statute, which requires marking in a manner designed to enable the operator to know the approximate boundaries of the excavation. Representatives of Dig Safe Inc. asserted that all colors specified in Dig Safe procedures are adopted from national standards. As we stated earlier, we intend that this rule reflect both statutory and Dig Safe procedures, thereby providing all information regarding underground facility damage prevention in one document. We do not wish to change existing Dig Safe procedures, because they appear to be adequately effective in preventing damage and because we believe that conflicting requirements will be confusing to excavators and operators. Therefore, we decline to change the language in the rule as suggested by MPPA, except to reference the relationship between color and Dig Safe procedures. However, common sense dictates that MPPA's concern is valid. We expect that in all marking situations, excavators and operators will take the steps necessary to ensure that their marks are noticeable and adequate to accomplish their purpose.[6]

2. Section 4(B): Notification to Dig Safe

Section 4(B) states that the excavator must notify Dig Safe before beginning excavation, must receive acknowledgement in certain instances, must provide additional notifications when blasting, must re-notify Dig Safe if excavation begins 30 days beyond the notification, and must provide similar notification to non-member operators. The section also describes the required content of Dig Safe notifications.

Northern suggested that Section 4(B)(1)(a) specify that excavators make non-emergency notification during Dig Safe's normal business hours. This revision is consistent with the time frames specified in Section 5 and provides excavators with an accurate indication of when they should contact Dig Safe, and we have incorporated it in the final rule.

On Target commented that the language of Section 4(B)(1)(d) does not require an excavator to notify Dig Safe when an excavation commences within, but extends beyond, 30 days of the notification date as our Notice of Rulemaking asserted it should. On review, we conclude that the language in the draft rule is accurate because it derives from the statute and we understand that it mirrors current Dig Safe procedures. Therefore, the final rule remains unchanged. We note that, according to this language, an excavator is not required to re-notify Dig Safe if an ongoing job extends beyond 30 days.

[6] For example, an excavator may use flags or stakes.

Northern suggested that excavators be required to provide confirmation of compliance with the pre-marking requirements of this rule in the contents of notification required in Section 4(B)(1)(e). Northern commented that failure to pre-mark should be considered negligence if a facility is damaged. We decline to go beyond the explicit provisions of the statute. However, we are not precluded from considering, in a proceeding carried out pursuant to Section 7 of this rule, whether an excavator's failure to pre-mark constitutes negligence and warrants imposition of a penalty.

Maine Dig Safe and CMP commented that Section 4(B)(1)(e)(6) should be deleted. This provision required that the excavator notify Dig Safe of the name of the person for whom the proposed excavation is being performed. The commenters asserted that the person's name is not now included in the notification and that the operators' and Dig Safe's forms and procedures must change to add this item. There is no apparent need to notify Dig Safe of this information, which can be readily obtained from the excavator if necessary, and we have deleted it from the final rule.

We moved Section 4(B)(3) of the draft rule to Section 4(E)(1), for clarity and consistency.

3. Section 4(C): Excavation

Section 4(C) establishes safety procedures that an excavator must follow. The section states that an excavator may commence excavation after taking reasonable steps in an emergency, must use non-mechanical means to expose facilities within a 36-inch safety zone, and must maintain operators' markings. We received no comment on this provision of the draft rule and make no substantive modifications.

4. Section 4(D): Reporting

Section 4(D)(1) directs an excavator to notify the operator when the excavator damages an underground facility. Some commenters asserted that it should not be necessary to report minor damage such as scratches and expressed concern that an excavator would find it difficult to judge when notification must occur. This provision derives from statute, and we decline to change the language in the final rule. However, we believe that, while an excavator can judge a situation, the excavator should notify the operator in all instances when there is doubt.[7]

Section 4(D)(2) directs an excavator to notify the Commission when the excavator observes violations of the rule, establishes circumstances when notification should occur, and sets forth means for making the notification.

[7] For example, a scratch that penetrates a surface that protects a facility from corrosion should be reported.

In their written comments and their comments at the public hearing, many persons recommended that this reporting requirement be revised or eliminated.[8] MMA, MPPA,[9] and MWUA suggested eliminating the reporting provision altogether. MWUA, CMP, and TAM commented that the provision was not supported by statute. MMA, MWUA, CMP, and TAM expressed concern that good working relationships between excavators and operators would be jeopardized if these entities must report one anothers' violations. These commenters cited long standing relationships that allowed these entities to solve violation problems among themselves, on the excavation site, in a manner that was safe and expedient. MPPA expressed concern that the language appeared to extend to off-duty excavators, and TAM expressed concern that an observer might find it difficult to judge when a violation had occurred. MMA and TAM questioned the penalty for not reporting or for reporting incorrectly. TAM and MPPA suggested that, if reporting is necessary, the Commission encourage but not require it. CMP suggested that only violations resulting in damage be reported. BA suggested using its forms as a starting point for violation reporting. MMA commented that enforcement should rest with the state, not with excavators and operators.

First, we will address our authority to require reporting. 23 M.R.S.A. § 3360-A(11) allows the Commission to "adopt procedures necessary and appropriate to gather information and hear and resolve complaints concerning failure to comply with the provisions of this section." We believe that requiring reports from entities covered by the rule falls within this authority, and indeed we would find it impossible to enforce the rule absent some level of reporting.

The Commission is responsible for ensuring that the rule is enforced consistently and thoroughly, and we are responsible for monitoring the rule's effectiveness and recommending changes to the statute or making changes to the rule. However, as stated in the Notice of Inquiry in this proceeding, the Commission can discover violations to this rule only through reports from persons who observe them. The lack of independent detection capability places us in the difficult position of requiring reporting of the type contained in this provision and in Section 6(C)(1).

As stated in our Notice of Rulemaking, we intend to implement a rule that is workable for all affected persons. With this in mind, we have considered the aspects of the reporting provisions that commenters found most burdensome and we weighed those concerns against our need to obtain information. The final rule maintains a reporting requirement, but narrows its scope to those instances that we find necessary to perform our duties, and to those instances in which excavators and contractors can clearly judge the action they should take.

---

[8] MMA, MWUA, MPPA, CMP, TAM, NE Dig Safe all submitted comments regarding this requirement.

[9] IP and MFPI generally supported MPPA on this issue and on many others.

The language of the final rule requires reporting of violations "that the excavator observes during an excavation." This addition addresses the stated concern that an excavator should not be required to report a violation observed when the excavator is not carrying out or otherwise associated with the excavation activity. The language of the final rule also states that reporting is required only when an action poses a clear threat to an underground facility or results in damage to a facility. These conditions narrow the reporting requirement to situations that must be reported if the Dig Safe program in Maine is to operate safely. The addition of the term "clear threat" to Section 4(D)(2)(a) eliminates most instances when an excavator is uncertain whether a violation has occurred. The commenters' concern that entities with good working relationships must report on one another has not been eliminated. However, an entity that reports a violation will be doing so under a clear requirement by a state agency. We believe and hope that these limiting conditions will allow business partners to cooperate while ensuring that the Commission receives adequate information to operate a safe, effective underground facilities program.

Finally, the final rule states that any person may voluntarily report a violation of the rule or any other concern regarding underground facility damage prevention. This provision allows persons the flexibility to inform the Commission of any recurring or serious problem that should be addressed. We strongly encourage persons who have knowledge of potentially dangerous situations to report them so that we may eliminate the threat before any harm occurs.

We note that the Commission's role is to administer and enforce the law in a way that will, over time, lower the frequency of damage to underground facilities through appropriate enforcement proceedings. The Commission lacks both the authority and the resources to prevent a violation while it is happening; thus, we strongly urge all persons to immediately inform their local police or other enforcement authority if they observe actions that appear imminently dangerous.

5. Section 4(E): Legal Effect of Non-compliance

Section 4(E)(1) incorporates a provision in the statute (23 M.R.S.A. § 3360-A(6-B)) that establishes that an excavation that results in any damage to an underground facility undertaken without provision of all required notices constitutes prima facie evidence in a civil or administrative proceeding that the damage was caused by negligence. This section appeared as Section 4(B)(3) in the draft rule. No commenters objected to this provision. However, we observe that the language in the draft rule did not accurately reflect the statutory language, and we have revised the section in the final rule accordingly.

Section 4(E)(2) incorporates a provision in the statute (23 M.R.S.A. § 3360-A(6)) that affords an excavator protection against liability for damage or injury caused by the excavation if the excavator has complied with certain requirements to notify member operators. This section appeared as Section 4(E) in the draft rule. No commenters objected to this provision. However, we observe that the language in the

draft rule did not accurately reflect the statutory language, and we have revised the section in the final rule accordingly.

Section 4(E)(3) has been added to the final rule. It incorporates a provision in the statute (23 M.R.S.A. § 3360-A(10)) that protects an excavator against liability for damage or injury caused by the excavation if the excavator has complied with certain requirements to notify non-member operators and was otherwise not negligent.

6. Section 4(F): Exemption; Commercial Forestry and Borrow Pit Operations

Section 4(F) exempts commercial timber harvesting and borrow pit operations from certain notification requirements under certain conditions. This provision is derived from a provision in the statute that accommodates unique conditions that exist for the forestry industry in the State. MPPA, Plum Creek, MFPC and IP applauded the inclusion of this exemption in the statute and urged the Commission to maintain the provision's ability to facilitate timber operation activities. During the public hearing, Plum Creek questioned whether commercial timber harvesting and borrow pit activities were exempt from the pre-marking requirements of Section 4(A) pursuant to the exemption allowed under Section 4(F)(2). Others commented during the hearing and in written comments that the exemption was intended to include exemption from pre-marking, because the agreement between the excavator and the operator would specify the geographic location of the excavation and the facilities in a manner that ensured safety and was acceptable to both parties. We agree that these activities are exempt from the pre-marking requirement under Section 4(F)(2) and have changed the language in the final rule. In addition, for simplicity and without broadening the exceptions, the final rule widens the exemptions referenced in Section 4(F)(2) to include all of Section 4(C).

F. Section 5: Responsibilities of Dig Safe

Section 5 establishes the tasks that must be performed by Dig Safe. The provisions are derived from the statute and from Dig Safe's current operating procedures.

1. Section 5(A): Notification

Section 5(A) directs Dig Safe to notify member operators when Dig Safe receives notice of an excavation. We received no comment on this provision of the draft rule and make no modifications.

2. Section 5(B): System Requirements

Section 5(B) establishes Dig Safe operational requirements, including communication, cost allocation, and record-keeping procedures.

Bangor Water District suggested that Dig Safe's telephone number be removed from Section 5(B)(1) because the number might change. BA also commented that the phone number is not needed (although its presence would not pose a problem) because it is prominently displayed in telephone directories. The rule contains many provisions that derive from Dig Safe procedures (Section 4(A), Sections 5(B)(2) through 5(B)(5), and Section 6(B)(3) are examples). We have considered the risk that Dig Safe may revise these procedures, thereby rendering our rule inconsistent. We have chosen to retain the Dig Safe procedures in the rule in an effort to create a useful, comprehensive Dig Safe document for all persons engaged in underground facility damage prevention. We therefore have retained Dig Safe's telephone number in the final rule, but have indicated that operators have the responsibility of ensuring that they use the then-current number should that number change.

New England Dig Safe and Northern commented that the response times specified in Section 5(B)(2), 5(B)(3) and 5(B)(4) reflect Dig Safe's normal operating procedures, but that under high-volume conditions, Dig Safe's response might necessarily become slower. New England Dig Safe expressed a desire that the Commission modify the rule to reflect the practical limitations of a telephone answering service. In recognition of these practical limitations, we have changed the language in the final rule to state that the time limits for Dig Safe emergency response will be accomplished under normal operating conditions and that otherwise Dig Safe will respond as soon as practicable. In addition, in Section 5(B)(4), we have revised the time frame in which Dig Safe shall transmit non-emergency messages to "by 6 p.m. on the date of receipt," to be consistent with current Dig Safe operating procedures. Finally, we expect our staff to work with Dig Safe to monitor its response times annually to ensure that response times remain within acceptable limits.

MPPA recommended that Section 5(B)(5), which allows Dig Safe to require face-to-face meetings between excavators and member operators, be deleted. MPPA considered it inappropriate for the Commission to delegate such authority to a private party. This provision is derived from statute (23 M.R.S.A. § 3360-A(4)) and we therefore decline to change the language in the final rule.

3. Section 5(C): Public Awareness Programs

Section 5(C) requires Dig Safe to carry out various information activities. We received no comment on this provision of the draft rule and make no modifications.

G. Section 6: Responsibilities of the Operator

1. Section 6(A): Dig Safe Membership

Section 6(A) states that all underground facility operators must become members of Dig Safe and sets forth requirements for cost allocation and communication equipment. The definition of "underground facility operator" is derived from statute and exempts some entities.[10] Throughout this rule, we use the term "member operator" to refer to operators who have joined Dig Safe either voluntarily or because the law requires it. Section 6(A) states that operators that do not join Dig Safe must comply with the marking requirements of the rule, when notified by an excavator of an impending excavation. Throughout this rule, we use the term "non-member operator" to refer to operators who have not joined Dig Safe.

DOT expressed concern with what it has observed to be numerous instances in which underground facility operators have installed underground facilities within a right-of-way without legal authorization. DOT points out that such situations add to excavators' expenses and increase the likelihood that excavators may violate the terms of this rule. DOT suggested that language be added to Section 6 of the rule requiring operators to maintain legal locations of their facilities. We are hesitant to use an MPUC rule to state that an entity must follow a law or an agency requirement that does not fall within our authority, and therefore we have not added the suggested language to the final rule. However, we are sympathetic with DOT's concerns, and invite entities to point out such instances when they are relevant in an enforcement proceeding. When appropriate, we have the authority to use such information when determining penalties.

2. Section 6(B): Marking

Section 6(B) establishes the marking actions that an operator must perform and the time frames required for those actions. The actions include initial marking of a facility, re-marking following an excavator's request, marking in an emergency, and test hole procedures.

CMP commented that Section 6(B)(1) is applicable to all operators. We agree, and have revised the language in the draft rule to reflect that fact.

---

[10] Owners and operators of water facilities and sewage facilities are exempt, and municipalities or public utilities with fewer than five full-time employees or fewer than 300 customers are exempt.

BA asserted that it is necessary to allow two days for the re-marking required in Section 6(B)(2)(b). Since the 1-day requirement is derived from the statute, we decline to change the language in the final rule.

In its written comments regarding Section 6(B)(2)(d), CMP suggested that the time frame allowed for marking facilities when an operator intends to dig test holes be changed to "as soon as practical," to be consistent with current practice. During the public hearing, operators and excavators described the complex process by which excavators and operators interact with one another during the time frame required for their actions. Our understanding of the accommodation that operators and excavators make for each others' schedules causes us to leave the 1-day time frame in the final rule and add "or within a time frame agreed upon by the excavator" as a procedure that will work for both entities.

Section 6(B)(3) sets forth the colors used to mark the location of underground facilities. Consistent with our revision to Section 4(A), we have revised the language to reference Dig's Safe oversight of color.

Section 6(B)(4) describes marking procedures and is derived primarily from current Dig Safe procedures. On Target commented that the identification specified in Section 6(B)(4)(a) is not always possible to attain. We believe that the phrase "where practical" addresses this concern, and we have added it to the final rule.

3. Section 6(C): Reporting

Section 6(C)(1) establishes reporting requirements for operators that mirror the requirements for excavators set forth in Section 4(D)(2). In the final rule, the language in these two sections is similar, and our discussion of Section 4(D)(2) is equally relevant for Section 6(C)(1).

Section 6(C)(2) has been revised to require an operator to submit an annual report to the Commission containing the number of excavation notifications it received and the miles of underground facilities it operates. BA, CMP, MNG, TAM, MMA, and MWUA commented that the monthly report required by the draft rule was onerous or unnecessary. Many commenters suggested that the Commission obtain the information from Dig Safe. BA and CMP stated that they do not currently record the number of notifications that result in no facilities. TAM noted that small telephone companies receive few calls, making monthly reporting proportionally burdensome.

We require this information to allow us to compare the violation rates of utilities in the State, thereby determining where improvements in operations are necessary. We understand that Dig Safe is not able to provide the data. Therefore, we decline to remove the reporting requirement from the final rule.

However, in response to comments, the final rule requires annual rather than monthly filing of the report. In addition, the final rule requires the report to contain only the number of excavation notifications received by the operator and total miles of underground facilities. The final rule allows operators 75 days in which to submit this report. We note that, pursuant to Section 7(A), we may request some utilities to report the number of notifications that result in no facilities to allow us to monitor inefficiencies that may exist in the operation of the damage prevention program.

4. Section 6(D): Natural Gas Operators

Section 6(D) requires owners and operators of underground gas facilities to notify the fire department of an affected town before an excavation occurs and to provide information about their facilities to various government organizations whose citizens might be affected if the facilities are damaged. This provision adds an additional layer of safety to excavations near gas facilities, and derives from the statute.

Northern and MNG commented that the language in the draft rule did not accurately reflect the statutory directive for prior notice to fire departments. In particular, they observed that the draft rule required gas utilities to provide notice to fire departments every time Dig Safe notifies them of an excavation. They argue that the draft rule would expand the statutory directive and would unduly burden fire departments and gas utilities. We agree. The statute is specific and narrow in its directive, requiring gas utilities to notify the affected fire department only when the utility intends to commence work on an underground gas transmission line. 23 M.R.S.A. § 3360-A (3-B). We have revised the final rule accordingly.

In its comments, Bangor Water District questioned how the excavator would become aware that excavation could begin. The rule specifies that the gas utility operator must receive an acknowledgement from the fire department of its notification, either by telephone or in writing, before work may commence. We decline to add further requirements to this provision of the rule. It is not necessary to go beyond the parameters established in the statutory provision. We interpret this provision to mean that the gas utility operator planning the excavation will be responsible for informing the excavator when work may begin.

5. Section 6(E): Legal Effect of Non-Compliance

We have added provisions that mirror Section 4(E)(2) and 4(E)(3) in Section 6(E), to clarify the legal effects of non-compliance with Dig Safe provisions for actions taken by both the excavator and the operator. The provisions are re-stated in Section 6 in a manner that preserves the language of the statute but presents the information in a manner that is relevant to operators. Presenting them in both sections of the rule ensures that both parties are apprised of the legal effects of their actions. The provisions derive from statute.

H. Section 7: Commission Activities

1. Section 7(A): Monitoring

Section 7(A) empowers the Commission, when necessary, to obtain information from an excavator, an operator, or Dig Safe, in addition to reports already required by this rule.

MMA commented that this provision is open-ended and lacks appropriate guidance but did not suggest a modification. This provision of the rule derives from the statute. 23 M.R.S.A. § 2260-A(11). The statutory language conveys broad authority. We decline to modify this provision of the rule in a manner that would limit the authority that the legislature provided by statute. However, we have modified the wording of this provision for clarity and to more closely track the statutory language.

2. Section 7(B): Enforcement Action Procedure

Section 7(B) sets forth the procedure that all persons must follow when an enforcement action occurs. The procedure generally mirrors provisions in the rules of the Massachusetts Department of Telecommunications and Energy, adjusted to comply with Maine's statutory provisions. We envision that the incident reports required by Sections 4(D)(2) and 6(C)(1) will largely determine when the Commission will initiate an enforcement action. However, we will also consider complaints brought by any person and any other available material to determine whether to initiate an action.

Our goal in developing this procedure was to allow potential violations to be addressed informally and flexibly to the greatest extent possible. The rule allows a person named as committing a potential violation (respondent) to respond to an allegation in writing or in person, and it authorizes an informal review to occur. If the informal review fails to reach a satisfactory conclusion, the respondent may request an adjudicatory hearing. The rule establishes that these hearings will conform to the requirements of the Maine Administrative Procedures Act, 5 M.R.S.A. §§ 8001-11112.

In an effort to make the rule as clear as possible, we have modified the language of Section 7 of the draft rule significantly in several places. Our goal is to provide a comprehensive "roadmap" of the respondent's and the Commission's options at each stage of the enforcement process, without changing the basic outline of the process. We will explain any notable modifications in this order as we discuss each section.

a. Section 7(B)(1): Notice of Probable Violation

Section 7(B)(1) specifies that, first, the Commission shall issue a notice of probable violation (NOPV) containing its understanding of the facts surrounding the alleged violation and the penalty that the staff reviewer recommends that the Commission order, as well as a statement of the respondent's right to contest

the matter. Next, the respondent may contest the NOPV in writing or in person at an informal review. The rule states that if the respondent does not contest the NOPV within 30 days, the respondent will be in default and must pay the administrative penalty if ordered by the Commission. The rule also clarifies that the alleged violation will be treated as a violation for purposes of future applications of the rule in evaluating an excavator's or operator's record of violations.

No comments were made regarding this section of the rule. However, we have modified section 7(B)(1)(e) to clarify that the Commission must issue an order to enforce the penalty or remedial actions designated in the NOPV.

b. Section 7(B)(2): Informal Review and Section 7(B)(3): Recommended Decision

Section 7(B)(2) establishes an informal review process, if the respondent chooses to contest the NOPV. Section 7(B)(3) states that a Commission staff member will send a written recommended decision to respondent and to the Commission. If requested by the respondent, the Commission will further hold an adjudicatory hearing pursuant to Section 7(B)(4). At any time in the process, the parties may resolve the matter through a consent agreement pursuant to Section 7(B)(6). Section 7(B)(3) of the draft rule has been expanded to two sections to improve clarity.

BA commented in support of allowing resolution of alleged violations with an informal process. MMA noted that initiating enforcement procedures based on probable violations is "overbearing," but commented in favor of the proposed "grievance" process, noting that the informal process enables necessary discussion to occur while a more formal adjudicatory process is also available.

We conclude that substantive modification of the enforcement process structure contained in the draft rule is not warranted. We believe that by allowing a 3-step process beginning with notification of a probable violation, and then proceeding to an informal, and finally a formal, review at the request of the respondent, the rule increases the flexibility and efficiency of the enforcement process, thereby reducing the cost and time required of all parties.

Finally, we invited comments on whether a respondent should be allowed to bypass the informal review and to request an adjudicatory hearing immediately after receiving a notice of probable violation. We received no comments proposing that we modify the general structure of the enforcement procedures or urging us to bypass the informal review process contained in section 7(B)(2). Thus, we have not modified this section of the rule except to add clarity.

c. Section 7(B)(4): Adjudicatory Hearing

CMP and MPPA urged us to modify Section 7(B)(3)(a), "Election," of the draft rule (now 7(B)(4)) to extend from 10 to 30 days the time during

which a respondent may request an adjudicatory hearing after receiving the investigator's decision. CMP argued that allowing a reasonable time for a response is warranted given that the consequences of failing to make such a request can be significant. We agree and make this modification to the rule.

In their comments regarding Section 7(B)(3)(b) of the draft rule, "Admission," (now section 7(B)(4)(b)), CMP and MPPA urged us to strike the statement that a failure to request an adjudicatory hearing "shall be deemed an admission of the facts and conclusions stated in the investigator's decision" because of the legal implications this might have in other civil actions or other proceedings. CMP recommended that the rule simply state that the respondent will be liable to pay the administrative penalty or to take remedial action as ordered. We agree and have adopted CMP's recommendation in Section 7(B)(4)(b). MPPA also requested that we add a provision to allow resolution of a violation by consent decree. Since the rule presently contains a consent agreement provision at Section 7(B)(6), no further modification on this point appears necessary.

We add further language to Section 7(B)(4)(b) to clarify that an order following the respondent's failure to make a timely request for an adjudicatory hearing will be considered as a finding of a violation for purposes of future applications of the rule, unless otherwise ordered by the Commission. This provision makes clear that the consequences of a respondent's failure to request an adjudicatory hearing will include a Commission determination as to whether or not the incident should be counted as a record violation and, if so, the administrative penalty or remedial action will be imposed on respondent. Further, we have added language similar to that appearing in Section 7(B)(1)(e) to make clear that the Commission may not impose a greater administrative penalty than contained in the recommended decision without holding an adjudicatory hearing or obtaining the consent of the respondent.

d. Section 7(B)(5): Remedial orders

We modify Section 7(B)(4)(a) of the draft rule, there entitled "Action," now designated as Section 7(B)(5), to clarify that, after considering all of the evidence, if the Commission finds a violation has occurred, it may issue a remedial order.[11] We have renumbered the provisions in this section and have reworded them to improve clarity.

e. Section 7(B)(6): Consent Agreements

Other than the comments noted in our discussion of Section 7(B)(4)(b) above, we received no comments on this provision and make no modifications other than for clarity and numbering.

[11] See discussion of Section 8(A)(2) below.

f. Section 7(C): Delegation

Section 7(C) of the draft rule specified that the Commission could delegate portions of the review process to staff members. We received no comments on this provision. However, we have now determined that this section is unnecessary given the provisions indicating staff activity already contained elsewhere in the rule. Consequently, we have removed this section of the draft rule.

g. Section 7(C): Commission Action

We have added a new section summarizing all the potential courses of action that the Commission may take in response to an alleged violation. We do so in an effort to ensure that respondents will be fully aware of the options available to them as the Commission works toward the final resolution of the charges against them. Sections 7(C)(1) and (2) set forth the procedural steps that the Commission may take in cases where respondent has requested an adjudicatory hearing and where respondent has not requested an adjudicatory hearing. We have not made any substantive changes to the process outlined in the draft rule except to clarify that the Commission will deliberate the dispositions of all alleged violations and issue an order documenting its decision.

I. Section 8: Administrative Penalties

1. Section 8(A): Approval Required

Section 8(A) establishes that the Commission must approve an administrative penalty in a deliberative session in all instances, regardless of whether the penalty was recommended in a NOPV or following an informal review or is developed pursuant to the evidence submitted in an adjudicatory hearing. This satisfies the statutory requirement that the Commission have an adjudicatory process before imposing an administrative penalty.

Section 8(A)(2) states that Commission imposition of an administrative penalty by order satisfies the statutory requirement for an adjudicatory process. CMP interpreted Section 8(A)(2) in the draft rule to apply only to deliberations held after a respondent elected not to request an adjudicatory hearing. Accordingly, CMP suggested that we add language indicating that this applies only to deliberative session held after the process indicated in Section 7(B)(3)(b).

We do not agree with CMP's interpretation. Our intention in Section 8(A)(2) is to clarify that an order issued by the Commission at any of the three stages of the procedure outlined in the rule (e.g. default on NOPV, remedial order, consent agreement, or after an adjudicatory hearing) will satisfy the statutory requirement for an adjudicatory process. This is justified because the respondent is given notice and an opportunity to respond, and has a lawful opportunity to request a hearing at each stage in the enforcement process. 5 M.R.S.A. § 8002(1). Under the

provisions of the rule, the Commission will issue an order implementing an administrative penalty or remedial action, if one is warranted, when a respondent fails or chooses not to request further administrative review of an alleged violation or after an adjudicatory hearing. The process is, therefore, duly protective of the alleged violator and the procedures in the rule satisfy the requirement of an adjudicatory process before imposition of an administrative penalty. The language of Sections 8(A)(1) and (2) are appropriately worded to apply to dispositions of alleged violations made at any stage in this procedure. Our modifications to Sections 7(B)(1)(e) and 7(B)(4)(b) and 7(C) add clarity to the rule on this point and obviate the need for 8(A)(3) of the draft rule, which we have consequently removed.

2. Section 8(B): Penalty Assessment

Section 8(B) states that the Commission may assess a penalty on an excavator or a member operator after the informal review process outlined in Section 7.

The Associated Constructors of Maine, Inc. commented that this provision "appears to leave the amount of penalty wide open to the Commission." We note, however, that Section 8(E) provides specific limitations on administrative penalties that the Commission may assess and requires the Commission to consider the number of violations that are contained in the respondent's record within the 12 months prior to the violation under consideration. Thus, no modifications are necessary on this point but we have revised the provision for clarity.

3. Section 8(C): Violations

Section 8(C) contains the actions that constitute a violation of the rule for which an excavator or a member operator can be assessed an administrative penalty.

a. Section 8(C)(1) & (2): Non-compliant or negligent excavation

Section 8(C)(1) states that a penalty can be assessed if an excavator fails to pre-mark an excavation pursuant to Section 4(A), fails to notify Dig Safe before excavation pursuant to Sections 4(B)(1)(a) and 4(B)(1)(b), fails to notify Dig Safe before blasting pursuant to Section 4(B)(1)(c), fails to re-notify Dig Safe pursuant to Section 4(B)(1)(d), or fails to carry out the safety procedures required by Section 4(C)(2) of the draft rule. The statute, and Section 8(C)(2) of the rule, further state that an excavation conducted in a reckless or negligent manner that poses a threat to an underground facility constitutes a violation. Both Section 8(C)(1) and (2) are derived from the terms of the statute.

DOT commented that the Commission should waive the statutory penalty if the excavator's actions result in damage to an illegal facility. DOT notes that in some instances underground facilities have been improperly placed

outside the allowed easement or the specifications of the operator's permit. We decline to adopt the DOT's request for two reasons. First, sections 8(C)(1) and (2) are derived from statute; we do not have authority to waive them at our discretion. We can, however, consider the circumstances of any violation in determining an appropriate penalty.

Second, and most important, improper placement of facilities may violate DOT permitting rules, but does not constitute a violation of the Dig Safe law or our rule. The Dig Safe law and this rule simply require that the actual placement of facilities is marked accurately and timely to alert the excavator to their placement so that damage and compromised safety can be avoided. From a public safety standpoint, operators should be encouraged to comply with Dig Safe requirements. Fear that compliance will expose an operator's improperly placed facilities and subject the operator to legal action could discourage compliance and jeopardize the protection of underground facilities from damage during excavation. Accordingly, we make no change to the rule.

Bangor Water District posed a series of questions about the implications of Section 8(C)(1) in its comments. First, the District inquired whether, given the reference in Section 8(C)(1) to Section 4(C)(2) "Safety zone," any damage to a facility constitutes a violation. Section 4(C)(2) requires that an excavator use reasonable precautions to avoid damage to underground facilities when working within the proscribed safety zone. As the phrasing of Section 4(C)(2) makes clear, as long as the excavator employs "reasonable precautions" when working within the safety zone, no violation will be found. This is true even if the facility is privately owned. The Dig Safe law is applicable to all underground facilities falling within the definition regardless of whether they are privately or publicly owned.

Next, the District asked whether a violation would occur if the underground facility were intentionally cut and moved with the knowledge of the facility operator. Circumstances involving a knowledgeable and consenting operator in the relocation of underground facilities would not create an issue or constitute a violation under the Dig Safe law. All applicable notice and marking requirements still apply. We envision that the operator and excavator would negotiate the terms of the relocation of the facility and that the impact on the facilities would not constitute "damage" for purposes of enforcement of this rule.

b. Sections 8(C)(3) and (4): Operator non-compliance or negligence

Sections 8(C)(3) and 8(C)(4) apply similar penalties to member operators.

With regard to Section 8(C)(3) which establishes instances that may warrant administrative penalty, Bangor Water District commented that an operator could get caught in a conflict between two sections, Section 6(B)(4)(b),

"Tolerance zone" and Section 6(B)(4)(c)(2) "Center line marking method." Upon review, we conclude that these two sections use slightly different terminology but are conceptually consistent. The first describes a tolerance zone with boundaries located 18 inches plus half the width of the facility from the centerline of the facility. The second places the tolerance zone boundaries 18 inches from each side of the facility. We do not find a conflict in this language and see no need to make any modifications of this provision of the rule given that the variable language is necessary in the respective contexts in which it appears.

Sections 8(C)(3) and (4) are derived from the terms of the statute and we decline to change them.

c. Sections 8(C)(5): Other reckless or negligent behavior

Section 8(C)(5) of the draft rule proposed to identify other failures to comply that the Commission would consider to be reckless or negligent for the purpose of assessing penalties. These included failures to take actions necessary for adequate notification under Sections 4(B) and 4(C) or necessary for adequate marking under Section 6(B).

CMP and MPPA urged us to strike Section 8(C)(5) from the rule. MPPA argued that there is no basis in statute for these violations and that defining these actions as violations is unnecessary to effectively enforce the Dig Safe law. In addition, CMP argued that not all mismarking or delay in responding to notification of an excavation beyond the terms of the rule is harmful or constitutes reckless or negligent behavior. At the hearing, MPPA expressed no concern with the Commission's ability to assess reckless or negligent behavior on a case-by-case basis.

We included Section 8(C)(5) in the draft rule in the expectation that knowing in advance how the Commission might view the seriousness of such violations would be of substantial value to excavators and operators. It appears that some commenters disagree with the advance characterization of certain types of non-compliance as reckless or negligent behavior because in doing so we run the risk of overstating the nature and gravity of some violations.

We are persuaded that, because we can determine whether a violation constitutes reckless or negligent behavior through examination of the facts of cases that come before us, we do not need to further define those cases in our rule in advance. Consequently, we delete Section 8(C)(5) entirely from the rule at this time. We note, however, that over time, the pattern of incidents may convince us that certain violations always rise to the level of reckless or negligent behavior. We may decide in the future to modify the rule or recommend statutory changes if we see a public safety benefit in doing so.

d. Remaining Sections: 8(D)-(G)

Section 8(D) incorporates a new statutory provision that requires the Commission to consider an excavator's or member operator's safety record during the prior 12 months. Section 8(E) establishes the maximum penalty levels the Commission may impose for the first violation within a year and for subsequent violations within a year. Section 8(F) allows the Commission to require an excavator or operator to participate in an educational program conducted by Dig Safe. We received no comment on these provisions of the draft rule and make no modifications.

Section 8(G) authorizes the Commission to take appropriate punitive action under its contempt authority (35-A M.R.S.A. § 1502) if an excavator or an operator fails to comply with the reporting requirements of the rule. This provision of the draft rule also states that we will only impose an administrative penalty in cases of willful failure to report. We have deleted this provision as it is a duplication of the statement of our authority provided in Section 9 and because we prefer to make the determination of when we will impose an administrative penalty on a case-by-case basis.

J. Section 9: Contempt

Section 9 states that the Commission may use its contempt authority, 35-A M.R.S.A. § 1502, to punish non-compliance with the provisions of this rule or its orders and requirements. We received no comment on this provision and make no modification.

K. Section 10: Imprudent action

As directed by statute, Section 10 states that an excavator or operator may be held liable for damages caused when the excavator or operator acts in a manner that is not careful or prudent. This provision clarifies that conforming to the provisions of the rule does not absolve a person from acting prudently in any situation that occurs. We received no comment on this provision and make no modification.

L. Section 11: Injunctions

Section 11 establishes conditions under which the Commission or an operator may begin a court action seeking a temporary restraining order or injunction to prevent unsafe excavation. The provision is derived from the statute. We received no comment on this provision but have modified it to a more streamlined form. Persons wishing to view this statutory provision in detail may refer to the text of the law by referencing the citation we have provided in the rule.

Accordingly, we

O R D E R

1. That the attached Chapter 895, Underground Facilities Damage Prevention Requirements, is hereby adopted;

2. That the Administrative Director shall file the adopted Rule and related material with the Secretary of State; and

3. That the Administrative Director shall send copies of the Order and the attached Rule to:

A. All utilities operating in Maine, including natural gas pipeline utilities;

B. Sewer and cable TV operators to the greatest extent practicable;

C. Excavators operating in Maine, to the greatest extent practicable;

D. All persons who have filed with the Commission within the past year a written request for Notice of Rulemakings;

E. All persons on the service list of Docket No. 2000-419; and

F. The Executive Director of the Legislative Council (20 copies).

Dated at Augusta, Maine, this 31st day of October, 2000.

BY ORDER OF THE COMMISSION

_____

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

This document has been designated for publication

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.